Supreme Court, U.S.
FILED
FEB 10 1997
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No. 96-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL, on behalf of itself and its members,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 10, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Background And The Laws In Question

At issue in the Petition are a series of South Carolina laws, executive orders and regulations that purposefully discriminate against interstate commerce. The conceded objective of those laws was to erect barriers to the treatment, storage and disposal of hazardous wastes from *other* states at South Carolina disposal and treatment facilities.[1] Those laws, executive orders and regulations, which together comprise a comprehensive effort to discriminate against interstate waste (*see* Pet. App. 33a) fall into three categories:

(1) *Blacklisting/Embargo and Preference Laws*: These laws purported to ban treatment facilities located in the state from receiving wastes from customers located in other states that, in South Carolina's view, are not adequately fulfilling their responsibilities under federal law and expressly require treatment and disposal facilities in South Carolina to provide "favored" treatment to wastes generated in South Carolina; [2]

(2) *Quotas*: These laws purported to place an absolute limit or cap on the volume of wastes that

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[1] The facility most affected by these laws is the Pinewood hazardous waste management facility, located in Sumter County, South Carolina.

[2] Sections 5 and 9 of 1989 South Carolina Act No. 196, adding S.C. Code Ann. § 44-56-205 and amending § 44-56-130, and South Carolina Exec. Order 89-17. *See* Pet. App. 8a, 125a-28a, 142a-47a. Respondent notes that the Petition Appendix improperly refers to "SECTION *6*" and "Chapter *66*." See Pet. App. 127a. The correct reference is to "SECTION *5*" and "Chapter *56*." *See* Pet. App. 33a, 125a-26a. In addition, the Appendix improperly refers to Section 9 as amending "Section 44-*66*-130" when it is actually amending Section 44-*56*-130. *See* Pet. App. 33a, 126a, 127a.

South Carolina treatment and disposal facilities may accept from customers located in any state other than South Carolina, while not imposing similar quotas on their South Carolina customers; [3]

(3) *Facility Permit Requirements*: These requirements purported to bar construction or expansion of any treatment and disposal facilities where such expansion will, in part, serve to treat or dispose of wastes that are generated by present or future customers *outside* the State.[4]

This Action

In June 1996, in response to the series of statutes, executive orders and regulations outlined above, Respondent Environmental Technology Council, on behalf of itself and its members,[5] brought this action in the United States District Court for the District of South Carolina. On January 11, 1991, Judge Perry granted Environmental Technology's motion for a preliminary injunction, finding a strong likelihood of success on the merits as to Environmental Technology's claims that South Carolina's laws facially discriminated against out-of-state hazardous waste and thereby violated the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). *See* Pet. App. 102a.[6]

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[3] 1990 South Carolina Act No. 590, adding S.C. Code Ann. § 44-56-59 and amending § 44-56-60, and South Carolina Exec. Order 89-25. *See* Pet. App. 8a-9a, 129a-33a, 138a-41a.

[4] South Carolina Department of Health and Environmental Control Regulation 61-99. *See* Pet. App. 9a, 134a-37a.

[5] Environmental Technology Council (formerly the Hazardous Waste Treatment Council) is a non-profit association of companies that provide permitted commercial services for the recycling, treatment, storage and disposal of hazardous and non-hazardous wastes. The Pinewood facility is operated by Laidlaw Environmental Services, Inc. of Columbia, South Carolina.

[6] Respondent also alleged that South Carolina had violated the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, the Supremacy Clause, U.S. Const. art. VI, cl. 2, and 42 U.S.C. § 1983 (1994).

On September 20, 1991, the Fourth Circuit affirmed the preliminary injunction virtually in all respects, agreeing that South Carolina's statutes and executive orders "appear facially to discriminate against out-of-state hazardous waste." Pet. App. 68a-69a. In the course of that appeal, the United States filed a brief as *amicus curiae* addressing the Environmental Protection Agency's ("EPA") actions and supporting Environmental Technology's position. *See generally* Brief for the United States as *Amicus Curiae* in Support of Appellee (hereinafter referred to as "U.S. Amicus Brief").[7]

On April 13, 1995, the district court granted Respondent's motion for summary judgment. The court reaffirmed that the statutes and regulations in question were facially discriminatory and thus subject to the " 'virtually *per se* rule of invalidity' " established by this Court. Pet. App. 32a. It held that Petitioners had failed to provide *any* evidence of any non-discriminatory " 'legitimate local purpose' or the 'absence of nondiscriminatory alternatives' " to support the facially discriminatory laws. Pet. App. 33a. The district court also held that referral to EPA under the primary jurisdiction doctrine was "not appropriate." Pet. App. 30a.

The United States Court of Appeals for the Fourth Circuit again affirmed. *See* Pet. App. 4a. Referring to its earlier opinion, and applying well-established principles set forth by this Court, the court of appeals noted that where a state law facially discriminates against interstate commerce, a " 'virtually *per se* rule of invalidity' " applies. Pet. App. 18a. Thus, a form of strict scrutiny is invoked under which a State's effort to discriminate against interstate commerce may be justified only upon a showing that the discriminatory law or restriction is " 'justified by a valid factor unrelated to economic protectionism.' " Pet. App. 18a-19a (citation omitted).

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[7] Eleven copies of that brief have been lodged with the Clerk of this Court.

The court of appeals noted that "most of the provisions at issue here are not close calls" because

> they clearly discriminate against out-of-state waste either facially, in effect, or in purpose. The black-listing provision, floor for in-state wastes, ceiling for out-of-state wastes, and quotas for out-of-state and in-state wastes facially discriminate against out-of-state wastes by refusing admittance into South Carolina of certain wastes and giving express preference over South Carolina capacity to in-state wastes.

Pet. App. 19a. The various objectives asserted by the State to support these laws did not justify the *differential treatment* of in-state and out-of-state wastes. Pet. App. 22a. "None of the affidavits . . . submitted even purport to justify . . . discriminatory treatment of out-of-state wastes." *Id.*

With respect to two other requirements—(1) the "cap" or limit on total waste disposal and (2) the "needs" requirement for construction or expansion of facilities—the court of appeals noted that such laws might withstand scrutiny if structured to apply evenhandedly to in-state and out-of-state interests. Pet. App. 23a. However, the court noted that South Carolina had structured the provisions at issue here expressly to discriminate against interstate commerce. Pet. App. 23a-25a.

Thus, while an "evenhanded cap or limit [that] uniformly burdens both in-state and out-of-state interests" likely would survive a constitutional challenge, the cap set by South Carolina was not evenhanded: The cap could readily be circumvented on behalf of in-state interests, but remained absolute for out-of-state wastes. Pet. App. 23a. Moreover, the court noted that under South Carolina law, the non-discriminatory aspect of the limit—the disposal ceiling itself—could not be severed from the various discriminatory provisions tied to that ceiling. Pet. App. 24a n.21.

Similarly, the "needs" requirement had been structured by South Carolina "to prohibit facilities from expanding

to meet out-of-state needs, but to allow expansion to meet in-state needs." Pet. App. 25a. Thus, this provision also was facially discriminatory and subject to the *per se* test of invalidity. *Id.*

As had the district court, the Fourth Circuit rejected Petitioners' theory that Congress' delegation to EPA of the power to authorize or approve state programs in connection with the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, *see* 42 U.S.C. §§ 6901-92k (1994 & Supp. I 1995), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, *see* 42 U.S.C. §§ 9601-75 (1994 & Supp. I 1995), and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), displaced constitutional requirements or authorized the States to discriminate against interstate commerce. Pet. App. 14a-15a. Applying the standard set forth by this Court, the Fourth Circuit reaffirmed its earlier ruling that these statutes do not contain or reflect an "unmistakably clear" intention of Congress to allow state discrimination against interstate commerce. Pet. App. 13a-14a. It noted as well that EPA's regulations did not resolve any constitutional question and that EPA had never expressly approved any of the South Carolina laws at issue. Pet. App. 14a-15a, 17a.

Finally, the Fourth Circuit rejected Petitioners' argument that the primary jurisdiction doctrine governed, holding that "[t]he EPA's special expertise is not needed to decide a question of law in a constitutional matter." Pet. App. 27a.

The petition followed.

REASONS FOR DENYING THE WRIT

THIS CASE PRESENTS NO ISSUE UPON WHICH THE CIRCUIT COURTS HAVE DISAGREED AND DOES NOT RAISE SUBSTANTIAL ISSUES WARRANTING THIS COURT'S REVIEW

The court of appeals was able to draw upon an unusual wealth of recent precedent and clear direction from this Court in resolving the issues presented by this case. Many of the historically controlling principles have been reaffirmed and elaborated in very recent decisions of this Court, including decisions specifically addressing interstate commerce in waste materials. Indeed, many of these decisions were rendered after the South Carolina laws at issue were initially enacted and after this case was initially filed. The court of appeals' initial decision affirming the grant of a preliminary injunction, Pet. App. 50a *et seq.*, thus relied upon historic principles that have *since* been restated by this Court in cases such as *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392-95 (1994), and *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 340-45 & n.3 (1992). *See also Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98-102 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359-61 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-78 (1988); *Maine v. Taylor*, 477 U.S. 131, 137-40 (1986); *Sporhase v. Nebraska*, 458 U.S. 941, 954-59 (1982); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-29 (1978). The Fourth Circuit did not express any difficulty understanding the Court's precedents on these issues. Petitioners nowhere suggest a conflict in the circuits.

Specifically, this Court has firmly established that the Constitution contemplates the free flow of commerce across state borders, for the Constitution contemplated, among other things, a national economic union. *See City of Philadelphia*, 437 U.S. at 623. States may regulate as

they see fit, but they are *not* free to erect discriminatory barriers to interstate commerce or to enact discriminatory restrictions on the flow of interstate goods and services into the state in order to preserve resources for the benefit of their own citizens. *See Chemical Waste Management, Inc.*, 504 U.S. at 339-41.

The Commerce Clause thus "limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Ind.*, 486 U.S. at 273. Moreover, this Court has made clear that this constitutional principle extends to the transportation of wastes, including hazardous wastes, for treatment and disposal. *See C & A Carbone, Inc.*, 511 U.S. at 389 (town's solid waste flow control ordinance falls "within the domain of the Commerce Clause"); *Oregon Waste Sys., Inc.*, 511 U.S. at 100 (applying Commerce Clause to solid waste regulation); *Chemical Waste Management, Inc.*, 504 U.S. at 340 n.3 (concluding that Commerce Clause applies to the disposal of hazardous waste); *Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 359 & n.3 (stating that interstate movement of solid waste is governed by Commerce Clause); *City of Philadelphia*, 437 U.S. at 622-23 (noting that waste is article of interstate commerce governed by Commerce Clause).

In the opinion below, the Fourth Circuit noted that " 'a virtually *per se* rule of invalidity' applies where a state law discriminates facially, in its practical effect, or in its purpose." Pet. App. 18a (quoting and citing *Wyoming v. Oklahoma*, 502 U.S. at 454-55). When a law discriminates against interstate commerce—as is the case here—it can only be sustained if it " 'is demonstrably justified by a valid factor unrelated to economic protectionism' " and "there are no 'nondiscriminatory alternatives adequate to preserve the local interests at stake.' " Pet. App. 18a-19a (quoting and citing *New Energy Co. of Ind.*, 486 U.S. at 274 and *Chemical Waste Management, Inc.*, 504 U.S. at 342).

The Fourth Circuit applied these principles in analyzing Petitioners' evidence and argument in support of their

efforts to prevent out-of-state waste materials from entering South Carolina for disposal. The State's generalized health and safety concerns simply failed to justify the discrimination built into the regulatory scheme. As the court explained, "concern for citizens' health, safety, and welfare" provides no basis for *distinguishing* between in-state and out-of-state waste because "[h]azardous waste is equally dangerous whether generated within South Carolina or out-of-state." Pet. App. 20a (citing *Chemical Waste Management, Inc.*, 504 U.S. at 344-45).

Similarly, South Carolina's asserted purpose of preserving disposal capacity within the state could not justify discrimination. As explained in *City of Philadelphia* and discussed by the Fourth Circuit, a State's natural resources "may not be hoarded under the Commerce Clause." Pet. App. 21a; *see also Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 366; *Sporhase*, 458 U.S. at 956-58; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *City of Philadelphia*, 437 U.S. at 627; Pet. App. 70a-71a.

The court of appeals also rejected Petitioners' argument that the free flow of commerce imposed an unfair burden on South Carolina, noting that the Commerce Clause does *not* require "fairness" in the way that resources and businesses are allocated among States, but rather it prohibits discrimination. Pet. App. 21a. Finally, the court found nothing in the Capacity Assurance Plan ("CAP") requirement imposed by SARA that contemplated discrimination against out-of-state waste. The Commerce Clause does not "allow states to punish other states for not disposing of their wastes through a CAP or otherwise. That task is left exclusively to Congress." Pet. App. 21a-22a.

Petitioners do *not* dispute the Fourth Circuit's findings or reasoning on any of these issues. Rather, Petitioners argue: (1) that Congress has authorized South Carolina's facially discriminatory laws; (2) that two of the provisions—the disposal cap and the needs regulation, *see*

supra at 4-5—are neutral; and (3) that the doctrine of primary jurisdiction should apply.

With respect to each of these issues, this Court has supplied clear guidance, and the Fourth Circuit properly applied this Court's precedents.

A. Congress Did Not Authorize States To Enact Laws That Discriminate Against Interstate Commerce Involving Hazardous Waste

The most strongly urged of Petitioners' three arguments is that Congress has authorized South Carolina to enact discriminatory laws barring the flow of waste into the State by virtue of RCRA, CERCLA, and SARA, as well as EPA's "approval" of its regulatory role in these national environmental programs. As Petitioners acknowledge, however,

> for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent [to free the States from those restrictions] must be *unmistakably clear*. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not . . . merely a wooden formalism.

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91-92 (1984) (emphasis added); *see* Pet. App. 13a (citing *South-Central Timber*). The requirement that Congress' intention to permit State discrimination be "unmistakable" has been repeatedly reaffirmed by this Court. *See C & A Carbone, Inc.*, 511 U.S. at 408 (O'Connor, J., concurring); *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 213 (1983); *Sporhase*, 458 U.S. at 960; *New England Power Co.*, 455 U.S. at 340-43; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-56 (1982).

The Fourth Circuit found at both the preliminary injunction stage, Pet. App. 73a-75a, and the summary

judgment stage that Petitioners had provided no persuasive evidence that "Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause." Pet. App. 14a (citation omitted).

Petitioners suggest that an "unmistakably clear" statement of congressional intent to allow state discrimination against interstate commerce can be found in RCRA's general requirement that a state RCRA program must be "consistent" with the state or federal programs operating in other states. 42 U.S.C. § 6926(b)(2) (1994); Pet. App. 106a. This statutory provision, requiring only "consistency," contains no language which would allow a State to impose a barrier against the transportation and disposal of out-of-state hazardous wastes within the State. As the Fourth Circuit held, nothing in RCRA, CERCLA, or SARA either grants the power to discriminate against out-of-state wastes or even contemplates that the States would have such power. *See also National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 721-22 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir.), *cert. denied*, 501 U.S. 1206 (1991) (SARA does not authorize discrimination against interstate commerce); *Alabama v. United States Envtl. Protection Agency*, 871 F.2d 1548, 1555 n.3 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989) (CERCLA does not authorize discrimination against interstate commerce).

Indeed, Petitioners do not seriously press the argument that these statutes themselves authorize States to erect discriminatory barriers to interstate commerce. Rather, Petitioners argue that such authorization can be inferred from regulations EPA adopted "to flesh out the federal approval process." Pet. 16. Thus, Petitioners are asking this Court to overlook the nonexistent authorization in the statutory language and, instead, to rely upon EPA's administrative interpretation of the "consistency" stand-

ard. *Id.* Petitioners' "view of the Agency's role in the federal system" is that EPA should be allowed to authorize discrimination against interstate commerce. Pet. 20.[8]

This theory has many flaws, not the least of which is that this Court has consistently required that the authorization to discriminate against interstate commerce come from Congress, not an agency. Though Congress may

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[8] In this regard, Petitioners' reliance on *White v. Massachusetts Council of Construction Employers* is misplaced. In *White*, this Court considered the constitutionality of Boston's requirement that construction projects using certain federal funds be performed by a workforce at least half of whom were Boston residents. The Fourth Circuit found that *White* was inapposite because:

> The Supreme Court upheld the Mayor's order, finding that Boston acted as a market participant in spending the city's money. There is a well-settled exception to the dormant Commerce Clause for states or cities acting as market participants as opposed to government regulators of the market. Additionally, the Court noted that although federal funds were also implicated, Congress had specifically contemplated and directed that those funds be used in a similar manner to the city's money: to stimulate economic recovery; to create permanent jobs; to retain jobs that would be lost; to provide jobs to lower income persons and minorities, including the unemployed; and to retrain workers. Furthermore, the regulations implementing Congress's directives contained similar mandates, affirmatively permitting the type of parochial favoritism contained in the Mayor's executive order. *Thus, the preference for local employment had been expressly contemplated and authorized by Congress. In contrast, here, Congress merely contemplated that state RCRA programs be consistent with the federal and other states' approved programs.* Congress did not contemplate nor direct that state RCRA programs implement economic barriers to hazardous waste from other states. Nor do the EPA's regulations affirmatively and expressly authorize economic barriers to the interstate movement of hazardous wastes.

Pet. App. 15a-16a n.15 (citations omitted) (emphasis added). Although Petitioners attempt to muddy the water, EPA has never expressly approved *any* of the challenged laws, as outlined by the United States itself in the brief it submitted in connection with the first appeal to the Fourth Circuit in this case. U.S. Amicus Brief at 29-33.

delegate to an agency the authority to approve state discrimination, the decision in the first instance is for Congress to make.

Significantly, even Petitioners' repeated references to EPA approval of state RCRA programs under a "consistency" standard are misleading in this context. At best, EPA has a general oversight responsibility that allows it to approve state RCRA programs for the regulation of hazardous waste generators, transporters and disposal facilities as a substitute for the federal regulatory structure *in that state*. Thus, EPA sets minimum standards for *administrative approval* of a state RCRA program. These minimum standards do not supplant any constitutional requirements. EPA's "review" of a state RCRA program is not focused on the constitutional issues presented here. *See* U.S. Amicus Brief at 30-31.

More importantly, notwithstanding the contrary implication in the Petition, "the EPA has *not* expressly approved *any* of the contested South Carolina laws." Pet. App. 17a (emphasis added). Petitioners do not challenge this conclusion. Indeed, EPA itself made clear to the court of appeals that it has *not* approved or passed upon the "challenged South Carolina statutes, executive orders, and regulation." U.S. Amicus Brief at 32. Thus, in no respect has EPA lent its imprimatur to the South Carolina laws in question. South Carolina's argument about what the effect of EPA approval might be, *if* EPA approval of these laws had been granted, is not an issue presented by this Petition.[9]

EPA's RCRA "consistency" regulation does not suggest that EPA believed it was authorized to supplant

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[9] As the United States discussed in the court below, it "is not necessary for this Court to address [the extent to which Congress has delegated power to the executive branch under RCRA or CERCLA to authorize state law that would otherwise offend the Commerce Clause] because EPA never approved South Carolina's challenged authorities." U.S. Amicus Brief at 30 n.16.

constitutional requirements, or that it was engaged in the delicate task of creating a constitutional standard, whether in initially promulgating or in revising its consistency regulation. *See* Pet. App. 74a. Petitioners simply ignore the fact that EPA itself has taken the position—and took the position in this case—that *Congress* has *not* authorized states to discriminate against out-of-state wastes. U.S. Amicus Brief at 22-23, 27-28.

In fact, Petitioners' argument is *not* that the agency has adopted a position that expressly authorizes a State to discriminate against interstate commerce. Petitioners cannot so argue because the consistency regulation itself prohibits such discrimination. 40 C.F.R. § 271.4(a) (1995); Pet. App. 109a. Rather, Petitioners' argument is that EPA's regulation adopts a *standard* for judging permissible discrimination for purposes of EPA's consistency review and that the EPA standard is slightly different from the standards that a court would apply if asked to determine whether a state law improperly discriminates against interstate commerce under the Commerce Clause.

Whether a particular law might be approved as "consistent" by EPA, though it would fail to meet the constitutional standards that a court would apply if asked to make a constitutional determination, is by no means clear. Moreover, even assuming a difference in standards, a determination by EPA that a state law meets the minimal standards for consistency does *not* suggest that EPA's RCRA standard supplants the constitutional principle of non-discrimination, where a court has been presented with a proper Commerce Clause claim. Subtle questions about the relationship between EPA approval of a state law as administratively "consistent," on the one hand, and constitutional requirements, on the other, or about the precise nature of any differences between these two standards as applied, might be fairly presented for review in a case in which EPA *has* approved the law in question. Those issues, however, are not presented by this case.

Moreover, drawing on established principles, the Fourth Circuit held that the authorization to permit a State to discriminate against interstate commerce must be part of the congressional plan, not merely an administrative agency's decision. Thus:

> States may not engage in economic protectionism and RCRA appears to contain no clear statement or indication of legislative intent to permit states to override the Constitution. EPA may change its interpretation of its own regulation; however, we cannot change the commands of the Constitution and Congress.

Pet. App. 77a (citations omitted). This Court's cases consistently describe the power to displace the limitations imposed by the Commerce Clause as a power that belongs to Congress. To be sure, in enacting a given statute, Congress may contemplate that a federal agency could, by approving a specific state action, place that approved state action beyond the reach of the Commerce Clause. Thus, the congressional power can be delegated. An agency cannot, however, assume that power on its own initiative. Therefore, even if EPA had approved the specific laws and regulations at issue as consistent with RCRA (which it did not), and even if EPA expected its approval to supplant constitutional requirements (which it did not), the question would still remain whether *Congress* contemplated that states might be authorized to enact facially discriminatory laws under these federal statutes. The Fourth Circuit concluded that it did not.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), does not stand for the proposition, asserted by Petitioners, that an administrative agency's endorsement can substitute for a congressional delegation of authority. *See* Pet. 20. At most, *Merrion* suggests that the statutory scheme itself may demonstrate that an administrative agency has been granted authority to approve actions which might otherwise violate the Commerce Clause. In *Merrion,* this Court held that the tax in question did

not violate the Commerce Clause because it evenhandedly burdened minerals sold, whether on or off the reservation. *See Merrion*, 455 U.S. at 156-58.

With respect to congressional authorization to enact discriminatory laws, Congress had provided in *Merrion* "a series of federal checkpoints" that governed the exercise of the power to tax by Native American tribes. *Id.* at 155. Congress specifically required approval by the Secretary of the Interior before a tribe could impose a tax upon nonmembers. *Id.* The Court found that the Secretary had twice approved the provisions at issue, once by approving the tribe's revised Constitution announcing its intention to tax non-members and once by approving the ordinance imposing the tax. *Id.* Congress had clearly contemplated that the tribes would implement the specific type of discriminatory tax at issue and had established a mechanism to ensure that any such tax was approved by the Secretary. *See id.* at 155-56.

Here, as the court of appeals determined, no evidence suggests that Congress contemplated facial discrimination such as that enacted by South Carolina. Moreover, the fact that EPA has never expressly approved *any* of the challenged enactments undermines the notion that specific checkpoints (such as those at issue in *Merrion*) have been put in place by Congress to permit federal agency approval and authorization of state laws discriminating against interstate commerce. *See* Pet. App. 16a-17a.

Significantly, the Eleventh Circuit has addressed the issue presented here. It reached precisely the same conclusion as did the Fourth Circuit. In *National Solid Wastes Management Ass'n*, the Eleventh Circuit held that SARA's capacity assurance requirement, a provision upon which Petitioners here too rely, was not congressional authorization of discriminatory actions by States which impede interstate commerce. *See National Solid Wastes*

Management Ass'n, 910 F.2d at 721-22. In an earlier opinion, the Eleventh Circuit similarly concluded that CERCLA did not have that effect. *See Alabama*, 871 F.2d at 1555 n.3.

Therefore, the issue presented was well-decided under clearly established principles. The question does not warrant this Court's attention.

B. South Carolina's Two Supposedly "Neutral" Laws Are Not Severable From South Carolina's Facially Discriminatory Laws And Are Not Neutral And Evenhanded

Petitioners' second argument is that two of South Carolina's challenged laws are neutral and evenhanded, requiring the courts to apply the *Pike* balancing test, rather than the "virtually *per se*" test of invalidity.

Neither provision is neutral, in fact. While granting that an evenhanded cap on the number of tons of waste which can be landfilled in the state in any given year would likely pass constitutional muster, the court of appeals noted that the disposal cap at issue here was *not* evenhanded. The cap was easily circumvented for the benefit of in-state interests but not for out-of-state interests. *See* Pet. App. 23a-24a, 129a-33a, 138a-41a. For instance, the ceiling could be lifted upon certification that it "is necessary to protect the health and safety" of South Carolina's citizens or that the entire statutory authorization of buried waste during the relevant twelve-month period was generated in South Carolina. Pet. App. 23a, 132a. No comparable exceptions applied to out-of-state waste. Thus, the cap discriminated against interstate commerce. *See* Pet. App. 23a-24a (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994)).

Petitioners devote only a few words in passing to the court of appeals' conclusion that the cap could not be severed from the portions of the law that rendered it discriminatory. This issue is one of state law. The court of

appeals held that it could not be severed because the court could not

> fairly presume that the South Carolina legislature would have passed the overall limit without the provision allowing the limit's increase if South Carolina wastes exceeded the cap. Nor can we assume that the limit would have been passed without the remaining provisions of the statute, which include floors for in-state-wastes and ceilings for out-of-state wastes. By protecting capacity for in-state interests, the legislature may have [s]quelched in-state political interests that might otherwise have lobbied against the overall limit.

Pet. App. 24a n.21.

Petitioners also suggest that the "needs" regulation, governing approval for new or expanded hazardous waste facilities based on "need," is also neutral. However, the "needs" regulation was itself structured to allow expansion to serve in-state waste generators, while prohibiting facilities from expanding to meet out-of-state needs. Pet. App. 25a, 136a. It thus plainly discriminated against interstate wastes.[10]

C. The Lower Court's Application Of The Primary Jurisdiction Doctrine Presents No Novel Or Important Legal Issue

Finally, Petitioners argue that the court of appeals erred because it failed to remit the constitutional issue to

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[10] Petitioners obfuscate the issue by complaining that the Fourth Circuit had no evidence before it demonstrating that expanded capacity would be used in a discriminatory manner or that expansions would be allowed whenever in-state need required. These two observations are irrelevant to the issue presented in the Petition. If the needs requirement is facially discriminatory, whether it might *also* be discriminatory in application does not save it from constitutional challenge.

EPA for determination under the doctrine of primary jurisdiction.[11]

As this Court has held, primary jurisdiction is a discretionary doctrine, designed to allow the courts to seek guidance from federal agencies for the resolution of factual (rather than legal) issues within the agency's special expertise. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976); *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); Pet. App. 26a. Legal issues within the competence of federal courts, however, should *not* be referred to an agency, especially where "the expert and specialized knowledge" of the agency is not required. *See Nader*, 426 U.S. at 305 (quoting *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *cf.* Pet. App. 26a (citing *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), and *cert. denied*, 464 U.S. 866 (1983)).

Petitioners argue that the case should have been referred to EPA so that EPA could construe the "federal statute and regulation." Pet. 28. Petitioners misconstrue the primary jurisdiction doctrine. The doctrine does not provide a vehicle through which a federal agency provides a consultation to the courts on the constitutional implications of a federal statute. The district court concluded, and the Fourth Circuit affirmed, that Environmental Technology's constitutional challenges presented only legal issues. Article III courts do not require agency assistance in deciding the constitutional issues presented by this case. *See Nader*, 426 U.S. at 305-06; Pet. App. 27a.[12]

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[11] South Carolina sought referral to EPA only after the district court and court of appeals had refused its request to stay the case and refer the issues to *state* proceedings under various abstention doctrines. Pet. App. 64a-65a n.10.

[12] Petitioners argue in a footnote that questions of fact were present such that referral to EPA was appropriate. However, South Carolina's laws were *facially* unconstitutional; in such cases,

Indeed, Petitioners have not shown that any such consultation was needed here; the courts had little difficulty understanding either the language or the workings of the federal statutory scheme. The statutes that Petitioners invoked simply do *not* support the proposition advanced by Petitioners: that Congress intended to authorize state discrimination against out-of-state waste.[13] The agency's advice was not needed to determine whether these provisions did, in fact, discriminate against interstate commerce.

In fact, Petitioners' argument that agency input as to the meaning of the statute or resolution of the constitutional question should have been obtained *via* the primary jurisdiction doctrine bears an air of unreality in the circumstances of this case: The United States appeared in the initial appeal on behalf of EPA, submitting a brief *amicus curiae,* demonstrating (1) that Congress has *not* authorized South Carolina to discriminate against out-of-state wastes under RCRA, CERCLA or SARA, and (2) that EPA itself has not done so either. U.S. Amicus Brief at 19-33. Where opinions of law are sought from an agency, one accepted method for doing so is to allow the agency to express its views as an *amicus curiae.* The EPA's views were presented here. The doctrine of "primary jurisdiction" may work well for the resolution of complex factual matters but was certainly not required here.

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only the language of the law itself, which Petitioners do not dispute, is at issue. Pet. 29 n.21.

[13] Petitioners confuse a number of different issues in arguing that the Fourth Circuit should have applied a *de novo* standard of review to the district court's decision not to refer the matter to EPA because the district court's decision was based on erroneous conclusions of law. The Fourth Circuit held that the question whether an issue should be referred under the primary jurisdiction doctrine is a discretionary matter. The Fourth Circuit then went on to hold that "because the matter at issue is a constitutional question which lies within this court's expertise, the district court correctly applied the law." Pet. App. 27a n.24.

The federal courts are competent to decide constitutional issues of the type presented without soliciting the advice of federal agencies. They are free to obtain the opinion of the United States on a legal issue as *amicus curiae* in such a case. Here, the United States provided that advice, and it did not aid Petitioners. Petitioners have not provided any support for the proposition that the lower courts' failure to refer constitutional issues to EPA violated established law or has created a disagreement among the circuit courts.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 10, 1997

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